



June 1996
RG-207

Senate Bill 14

Guidance Document for Taking Impact Assessments for Rules



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Note: At this time, this Interim Guidance Document and the TIA Checklist are intended for use in rulemaking actions. The TIA requirements for guidelines (guidance documents) and other policy statements are still under review and will be addressed at a later date.

I. Background

A. Senate Bill 14 (SB 14)

SB 14 requires this agency to prepare Takings Impact Assessments (TIAs) for governmental actions that are first proposed to be taken on or after January 1, 1996. The governmental actions requiring TIAs are primarily rules, guidance documents, and policies. The Attorney General is to provide guidance to affected agencies on how to determine if an action is a taking by January 1, 1996. SB 14 also allows a private real property owner to challenge this agency to determine whether a governmental action is a taking. These challenges may be filed as contested cases for governmental actions initiated by this agency after September 1, 1995. If an administrative law judge recommends that a taking has occurred, the agency, if in agreement, may either rescind the action or pay compensation. In addition to rules, guidance and policies, the agency may be sued for orders, permits, or other enforcement of rules and policies.

SB 14 lists several exceptions to governmental actions which might otherwise be subject to the bill's requirements. These will apply to most TNRCC activities. The TNRCC must be prepared to address any challenges to actions proposed to be taken after September 1, 1995. This may require the preparation of TIAs.

B. Definition of a "Taking"

An action is a "taking" if:

1. A taking under constitutional law (see Attorney General Guidance and Legal Division),
2. The action affects an owner's private real property:
 - that is the subject of the governmental action,
 - in whole or in part,
 - temporarily or permanently,
 - in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; **and**
 - it is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property (determined by comparing the current market value of the property as if the governmental action is not in effect and the current market value of the property determined as if the governmental action is in effect.)

C. Exceptions

The primary exceptions for the TNRCC are:

1. An action that is reasonably taken to fulfill an obligation mandated by federal law.
2. An action taken to prohibit or restrict a condition or use of private real property that constitutes a public or private nuisance.
3. An action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property.
4. An action that is taken in response to a real and substantial threat to public health and safety, which is designed to significantly advance the health and safety purpose, and which does not impose a greater burden than is necessary to achieve the health and safety purpose.

Note: If challenged on the above, the burden of proof rests with the agency.

II. TNRCC TIA

A. There are four components to the TIA

STATED PURPOSE-

The TNRCC program area will describe the specific purpose of the proposed action and identify whether and how the proposed action substantially advances its stated purpose. (Item I of the Checklist.)

ALTERNATIVES ANALYSIS-

The program area will be responsible for the major portion of the TIA that will include alternative plans for any covered action, and a justification of why the selected plan is favored.

ECONOMIC ANALYSIS-

The TNRCC's Strategic Planning & Appropriations will prepare the economic analysis portion of the TIAs which should be very similar to the Fiscal Note. The program area is responsible for coordinating with Strategic Planning & Appropriations.

TAKINGS DETERMINATION-

The TNRCC's Legal Division will be responsible for making the final determination as to whether a particular action may constitute a taking or falls under one of the exceptions. The program area is responsible for coordinating with the Legal Division for the takings determination.

B. The TIA Development Procedure

Program areas may have to prepare Takings Impact Assessments for the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure.

TIAAs are to be done on one of two levels:

1. *Full TIA* for actions that may affect private real property and for which no exception clearly applies.
2. *Short TIA* for actions that do not affect private real property or for which an exception does clearly apply.

The procedure involves the following steps:

(See flowchart, Appendix A.)

1. Program staff fills out a concept paper explaining the background of the proposed rulemaking.
2. The concept paper is presented to the Rules and Policy Review Committee (RPRC) for approval to proceed with rulemaking.
3. Program staff proceeds with rule development and follows the instructions in the TIA Checklist.
4. For any rulemaking that could affect private real property and for which an exception does not apply, the program area performs the alternatives analysis and Strategic Planning & Appropriations prepares the economic analysis portion of the TIA.
5. Legal Division reviews all relevant materials and makes the final determination whether the rulemaking and any alternatives could constitute a taking.
6. If the rulemaking is determined not to constitute a taking, it proceeds to proposal. If the rulemaking is determined to potentially constitute a taking, it is brought to a commissioners' work session for final direction.
7. Program staff prepares a summary of the TIA as part of the preamble for the rule proposal.
8. TIA, as revised in light of comments received, is also included in the rule adoption preamble.

III. Guidance for the TNRCC's Non-Program Areas

A. Strategic Planning & Appropriations

ECONOMIC ANALYSIS-

To incorporate the Takings Impact Assessment, the description of the agency action required under SB 14 will be included in the preamble to any publication of the proposal in the Texas Register in conjunction with the required fiscal impact and public cost/benefit statements.

The section will include a statement of no fiscal impact to state or local governments or a description of such impacts, as applicable. If an agency action that would result in a compensable taking were proposed, the description would include the potential financial liabilities of the state in regards to compensation.

The public cost/benefit section will be expanded to include a description of the benefits of the use of private property, if applicable. The description of costs will include, for rules, persons required to comply with the action (affected parties, small businesses, etc.), and will also include a description of the burdens imposed by the action on real property. If the action will result in effects on property values, this description will attempt to qualify and quantify those impacts.

Whether or not a sufficient burden exists to trigger the remedies available under the statute, the section should also state whether the action is exempt due to the circumstances allowed under the statute - an action required by federal law, an action to remove a nuisance or threat to life and property, etc. For any action not otherwise exempt, the section must state that a taking might occur, summarize the alternatives, and state whether a taking would result from an alternative.

B. Legal Division

TAKINGS DETERMINATION-

The Legal Division will review rule concept papers, Takings Impact Assessment Checklists, and rule proposals to determine if the rule falls within one of the exceptions in SB 14 or if the rule could constitute a taking. SB 14 also provides that a governmental action can be an action “that imposes a physical invasion or requires a dedication or exaction of private real property.” All real property must be the “subject of” a governmental action before a “taking” of that property can occur. Since there is no requirement that TIAs be prepared for actions involving permit or enforcement actions, Legal will concentrate on deciding if rules may be “takings” as defined in SB 14.

The definition of a taking in SB 14 is set out on the first page of this guidance document. Legal will determine (using the economic information provided by Strategic Planning & Appropriations) whether all economic uses of a property have been eliminated by the governmental action, or the

action affects an owner's private real property in a manner covered by the statute.

Under the terms of SB 14, governmental actions that are “physical invasions” or “dedications” or “exactions” also require a TIA. These actions, if any are actually taken, will generally be order or permit that do not require a TIA. However, the Legal Division will review actions to determine if a TIA should be prepared.

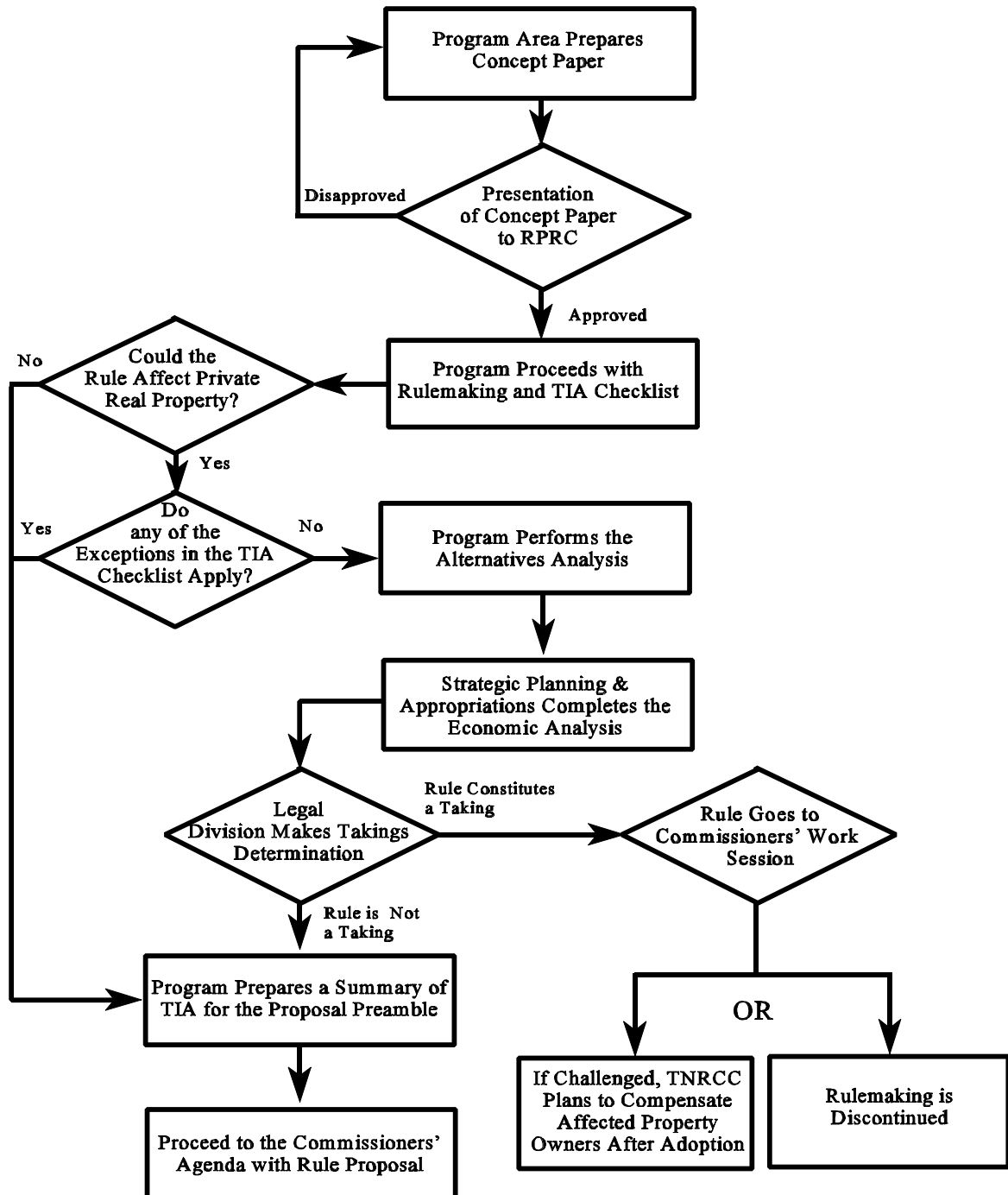
C. Office of Policy & Regulatory Development

COORDINATION-

Representatives of the TNRCC’s Office of Policy & Regulatory Development (OPRD) will be assigned to each rule package for which TIAs are completed to monitor progress and assist the program area throughout the process.

APPENDICES

Takings Impact Assessment Process for Rules





TAKINGS IMPACT ASSESSMENT CHECKLIST FOR RULES

Rule/Project No: _____

Short Title: _____ Legal

Services Contact Person: _____ Program

Contact Person: _____ Strategic Planning

& Appropriations Contact Person: _____ Type of TIA Performed:
SHORT TIA or FULL TIA (Circle one)

As instructed in the TIA Guidance Document, complete this form as part of the Takings Impact Assessment for a governmental action that is an adoption or issuance of a rule or regulatory requirement. Written answers or explanations should be made on a separate attached document. Supporting information can be obtained from the program area's concept paper.

Preparation of a Takings Impact Assessment is not a representation that a "taking" under the Constitution or under Chapter 2007 of the Texas Government Code has occurred.

I. Stated Purpose [Program area]

Attach to this checklist an explanation of the stated purpose issues outlined in the TIA Guidance Document.

II. Applicability and Exemptions [This section to be completed by the responsible program area in coordination with the Legal Division. ANSWER ALL QUESTIONS.]

A. Effect on Private Real Property

Does this action create a burden on private real property that is the subject of the regulation?

☐ YES ☐ NO

Explain on the attachment why there is or is not a burden.

B. Exemptions

1. Is this action reasonably taken to fulfill an obligation mandated by federal law?
☐ YES ☐ NO

If Yes, identify the law and the mandated federal obligation on the attachment.

2. Is this action taken to prevent a public or private nuisance?
☐ YES ☐ NO

If Yes, explain on the attachment.

3. If there a good faith belief that the action is necessary to prevent a grave and immediate threat to life or property?
☐ YES ☐ NO

If Yes, explain on the attachment.

4. Check Yes if all parts of this item (II. B. 4.) are answered Yes.
☐ YES ☐ NO

- a. Is this action taken in response to a real and substantial threat to public health and safety?
☐ YES ☐ NO

If Yes, explain on the attachment.

- b. Does the action significantly advance the health and safety purpose?
☐ YES ☐ NO

If Yes, explain on the attachment.

- c. Does the action impose no greater burden than is necessary to achieve the health and safety purpose stated in b. above?
☐ YES ☐ NO

Explain on the attachment.

5. Does this action make existing rules less stringent?
☐ YES ☐ NO

Explain answer on the attachment.

6. Does any other exemption in Senate Bill 14 specifically apply?
☐ YES ☐ NO

Explain answer on the attachment.

If you answered Section II. A. "No," OR if you answered any question in Section II. B. "Yes," STOP HERE and circle "SHORT TIA" at the top of this form. If you answered Section II. A. "Yes," AND if you answered all of questions 1 through 6 in Section II. B. "No," complete the rest of this checklist and circle "FULL TIA" at the top of this form.

III. Impact [This section to be completed by the program area and the Legal Division]

1. Does the action involve a physical invasion, dedication, or exaction of private real property?
☐ YES ☐ NO
2. Does the action restrict or limit a property right that would otherwise exist?
☐ YES ☐ NO
3. Does the action eliminate all economic uses of any private real property which is the subject of the rulemaking?
☐ YES ☐ NO
4. Does Legal concur with these answers on impact?
☐ YES ☐ NO

If you answered "YES" to question 1, 2, or 3, this action may constitute a taking.

IV. Alternatives [This section to be completed by the responsible program area]

1. Are there any alternatives to this action that would accomplish the stated purpose of Item I?
☐ YES ☐ NO

If alternatives exist, attach an analysis of whether each alternative could constitute a taking and a justification of why the action selected is preferred.

V. Value [This section to be completed by the program area and Strategic Planning & Appropriations]

1. Does the action require a capital expenditure? ☐ YES ☐ NO
2. Does the action enhance the value of the property? ☐ YES ☐ NO
3. Does the action impair the value of the property? ☐ YES ☐ NO

If so, how? What property rights are impaired? By how much? Attach

explanation and provide a stated amount, if possible, or an estimated range of the amount of the impairment.

\$ _____ or _____ %

**EXAMPLES OF
TIA PREAMBLE LANGUAGE**

IF THE RULES CAN HAVE NO AFFECT/NO BURDEN ON PRIVATE REAL PROPERTY:

The Commission has prepared a Takings Impact Assessment for these rules pursuant to Tex. Gov't Code Ann. Sec. 2007.043. The following is a summary of that Assessment. The specific purpose of the rule is _____. The rules will substantially advance this specific purpose by _____. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because _____.

IF THERE CAN BE AN AFFECT ON PRIVATE REAL PROPERTY, BUT THERE ARE EXCEPTIONS TO THE TAKINGS BILL WHICH APPLY TO THE RULES:

The Commission has prepared a Takings Impact Assessment for these rules pursuant to Tex. Gov't Code Ann. Sec. 2007.043. The following is a summary of that Assessment. The specific purpose of the rule is _____. The rules will substantially advance this specific purpose by _____. Promulgation and enforcement of these rules could burden private real property which is the subject of the rules.

However, the following exceptions to the application of Chapter 2007 of the Texas Government Code listed in Texas Gov't Code Sec. 2007.003(b) apply to these rules:

_____.

IF THERE CAN BE AN AFFECT ON PRIVATE REAL PROPERTY, AND THERE ARE NO EXCEPTIONS TO THE TAKINGS BILL WHICH APPLY TO THE RULE:

The Commission has prepared a Takings Impact Assessment for these rules pursuant to Tex. Gov't Code Ann. Sec. 2007.043. The following is a summary of that Assessment. The specific purpose of the rule is _____. The rules will substantially advance this specific purpose by _____. Promulgation and enforcement of these rules could affect private real property which is the subject of these rules.

The proposed (or adopted) rules will/will not involve a physical invasion, dedication, or exaction of real property which is the subject of the rules, do/do not restrict or limit a property right that

would otherwise exist, eliminate/do not eliminate all economic uses of private real property which is the subject of the rules.

The Commission has determined that there are no reasonable alternative actions that could accomplish the specified purpose of these rules.

OR

The Commission has determined that there is one reasonable alternative action/are reasonable alternative actions that could accomplish the specified purpose of these rules. This/These reasonable alternative/s are:_____.

This/These reasonable alternative/s would further the specified purpose of these rules by _____. This/These reasonable alternatives would/would not constitute a taking because _____.

The proposed (or adopted) rules do /do not require a capital expenditure, do/do not enhance the value of the real property which is the subject of the rules, and do/do not impair the value of the real property which is the subject of the rules.

IF THE VALUE OF THE REAL PROPERTY THAT IS THE SUBJECT OF THE RULES WILL BE IMPAIRED, ADD:

The value of the real property that is the subject of the rules will be impaired because _____, and the following property rights will be affected:

_____. The estimated range of the amount of the impairment is \$_____ or _____%.

APPENDIX D - EXAMPLES OF TIA ANALYSIS



TAKINGS IMPACT ASSESSMENT CHECKLIST FOR RULES

Rule/Project No: 95091-327-WS

Short Title: Spill Rules

Legal Services Contact Person: Marianne Baker (239-0475)

Program Contact Person: Stennie Meadours (239-2505)

Strategic Planning & Appropriations Contact Person: Not necessary

Type of TIA Performed: SHORT TIA or FULL TIA (circle one)

As instructed in the TIA Guidance Document, complete this form as part of the Takings Impact Assessment for a governmental action that is an adoption or issuance of a rule or regulatory requirement. Written answers or explanations should be made on a separate attached document. Supporting information can be obtained from the program area's concept paper.

Preparation of a Takings Impact Assessment is not a representation that a "taking" under the Constitution or under Chapter 2007 of the Texas Government Code has occurred.

I. Stated Purpose [Program area]

- 1) Attach to this checklist an explanation of the stated purpose issues outlined in the TIA Guidance Document.

The stated purpose is attached.

II. Effect on Private Real Property [Program area]

- 1) Could this action affect private real property? ☒ YES ☐ NO

If YES, go to Item III, Exceptions.

If NO, STOP HERE.

III. Exceptions [This section to be completed by the responsible program area and the Legal Division]

- 1) Is this action reasonably taken to fulfill an obligation mandated by federal law? ☐ YES ☒ NO

If YES, identify the law and the mandated obligation on the attachment.

- 2) Is this action taken to prevent a public or private nuisance? ☐ YES ☒ NO

If YES, explain on the attachment.

- 3) Is there good faith belief that the action is necessary to prevent a grave and immediate threat to life or property? ☐ YES ☒ NO

If YES, explain on the attachment.

- 4) Check YES if all parts of this item (Item III.4) are answered YES ☒ YES ☐ NO

- a) Is the action taken in response to a real and substantial threat to public health and safety? ☒ YES ☐ NO

If YES, explain on the attachment. The explanation is attached.

- b) Does the action significantly advance the health and safety purpose? ☒ YES ☐ NO

If YES, explain on the attachment. The explanation is attached.

- c) Does the action impose no greater burden than is necessary to achieve the health and safety purpose stated in (b) above? ☒ YES ☐ NO

Explain answer on the attachment. The explanation is attached.

If any one of questions 1, 2, 3, or 4 is answered "YES", and Legal concurs, STOP HERE.

If not, and the action could affect real private property (Item II), complete the rest of this checklist.

In either case, indicate the type of TIA being performed at the top of this form.

IV. Impact [This section to be completed by the program area and the Legal Division]

- 1) Does the action involve a physical invasion, dedication, or exaction of

private real property? ☐ YES ☐ NO

2) Does the action restrict or limit a property right that would otherwise exist? ☐ YES ☐ NO

3) Does the action eliminate all economic uses of any private real property which is the subject of the rulemaking? ☐ YES ☐ NO

4) Does Legal concur with these answers on impact? ☐ YES ☐ NO

If you answered "YES" to question 1, 2, or 3, this action may constitute a taking.

V. Alternatives [This section to be completed by the responsible program area]

1) Are there any alternatives to this action that would accomplish the stated purpose of Item I? ☐ YES ☐ NO

If alternatives exist, attach an analysis of whether each alternative could constitute a taking and a justification of why the action selected is preferred.

VI. Value [This section to be completed by the program area and Strategic Planning & Appropriations]

1) Does the action require a capital expenditure? ☐ YES ☐ NO

2) Does the action enhance the value of the property? ☐ YES ☐ NO

3) Does the action impair the value of the property? ☐ YES ☐ NO

If so, how? What property rights are impaired? By how much? Attach explanation and provide a stated amount, if possible, or an estimated range of the amount of the impairment.

\$_____ or _____%

Takings Impact Assessment
Rule Log No. 95091-327-WS
Spill Rules
Chapter 327, §§327.1-327.5
Attachment

I. Stated Purpose

The purpose of the spill rules is to clarify the reporting requirements found in §26.039, the Texas Water Code, and achieve the policy stated in the Texas Water Code, Texas Hazardous Substances Spill Prevention and Control Act, §26.262, which is to prevent the discharge or spill of hazardous substances into the waters in the state and to cause the removal of discharges or spills without undue delay.

The new rule substantially advances this purpose by establishing clear reporting and response action guidelines which should improve the timeliness, adequacy, coordination, efficiency, and effectiveness of responses to discharges or spills subject to the commission's regulatory jurisdiction.

III. Exceptions

4.

- (a) Is the action taken in response to a real and substantial threat to public health and safety?

Yes. Spills or discharges of hazardous substances, oil including refined product, used oil, industrial solid waste and other substances can present a real and substantial threat to public health and safety if not adequately responded to in a timely manner. On land such spills can be injurious to humans, animals, plant life, and other ecological receptors. Depending on the substance spilled, this can occur through short-term and long-term exposure. Spills to water can adversely affect humans, animals, aquatic plant and animal life, and other ecological receptors.

- (b) Does the action significantly advance the health and safety purpose?

Yes. The rule significantly advances the health and safety purpose by requiring a responsible person to notify appropriate parties of a discharge or spill. These parties include the the agency, owners and residents, and, in the event that a spill or discharge creates a potential for off-site human exposure, local emergency authorities. The rules also require a responsible party to immediately begin response actions and to cooperate with the TNRCC and the local incident command system.

- (c) Does the action impose no greater burden than is necessary to achieve the health and safety purpose stated in (b) above?

Yes, the rules establish very reasonable reporting standards which adequately balance the competing concerns of avoiding unnecessary over reporting with protection of human health and the environment. The rule also provides important flexibility because appropriate response actions at any time following the discharge or spill include use of the Risk Reduction Rules or other appropriate agency risk-based corrective action programs.

Takings Impact Assessment Preamble Language
Rule Log No. 95091-327-WS
Spill Rules
Chapter 327, §§327.1-327.5

The commission has prepared a Takings Impact Assessment for these rules pursuant to Tex. Gov't Code Ann. Sec 2007.043. The following is a summary of that Assessment. The purpose of the spill rules is to clarify the reporting requirements found in §26.039, the Texas Water Code, and achieve the policy stated in the Texas Water Code, Texas Hazardous Substances Spill Prevention and Control Act, §26.262, which is to prevent the discharge or spill of hazardous substances into the waters in the state and to cause the removal of discharges or spills without undue delay. The new rule substantially advances this purpose by establishing clear reporting and response action guidelines which should improve the timeliness, adequacy, coordination, efficiency, and effectiveness of responses to discharges or spills subject to the commission's regulatory jurisdiction. Promulgation and enforcement of these rules could affect private real property which is the subject of the rules.

However, the following exceptions to the application of Chapter 2007 of the Texas Government Code listed in Texas Government Code §2007.003(b) apply to these rules:

- (1) The action is taken in response to a real and substantial threat to public health and safety. Spills or discharges of hazardous substances, oil including refined product, used oil, industrial solid waste and other substances can present a real and substantial threat to public health and safety if not adequately responded to in a timely manner. On land such spills can be injurious to humans, animals, plant life, and other ecological receptors. Depending on the substance spilled, this can occur through short-term and long-term exposure. Spills to water can adversely affect humans, animals, aquatic plant and animal life, and other ecological receptors.
- (2) The action significantly advances the health and safety purpose. The rule significantly advances the health and safety purpose by requiring a responsible person to notify appropriate parties of a discharge or spill. These parties include the agency, owners and residents, and, in the event that a spill or discharge creates a potential for off-site human exposure, local emergency authorities. The rules also require a responsible party to immediately begin response actions and to cooperate with the agency and the local incident command system.
- (3) The action imposes no greater burden than is necessary to achieve the health and safety. The rule establishes very reasonable reporting standards which adequately balance the competing concerns of avoiding unnecessary over reporting with protection of human health and the environment. The rule also provides important flexibility because appropriate response actions at any time following the discharge or spill include use of the Risk Reduction Rules or other appropriate agency risk-based corrective action programs.

Texas Natural Resource Conservation Commission

INTEROFFICE MEMORANDUM

To: The Commissioners

Date: March 1, 1996

Thru: Chief Clerk's Office

From: Beverly Hartsock, Deputy Director
Office of Policy and Regulatory Development

Subject: **Docket Number 95-1642-SIP:** Consideration for adoption of a site-specific revision to the State Implementation Plan for the Dallas/Fort Worth ozone nonattainment area. If adopted the revision would authorize Bell Helicopter Textron, Incorporated to use an alternate reasonably available control technology as allowed in 30 TAC Chapter 115, Subchapter E, Section 115.423, concerning Alternate Control Requirements, in lieu of the control technology requirements specified in Section 115.421, concerning Surface Coating Processes.

This item concerns the adoption of a proposed site-specific State Implementation Plan revision for Bell Helicopter/Textron, Incorporated (Bell) Alternative Reasonably Available Control Technology (ARACT) as allowed under Chapter 115, §115.423(a)(4).

Bell was issued a Notice of Violation on September 30, 1992 by the Texas Natural Resource Conservation Commission (TNRCC) Arlington Regional Office for exceeding the volatile organic compound limit set forth in 30 TAC §115.421(a)(9)(iii) which was revised in 1991 to require that compliance be demonstrated on each coating line. Bell submitted an ARACT application, as a requirement of the agreed order signed by the Commissioners on November 18, 1994, for approval by the TNRCC and the U.S. Environmental Protection Agency.

The Engineering Services Section (ESS) staff has reviewed the technical and economic issues associated with the ARACT and believes that Bell has provided documentation that they can not completely meet the compliant coating requirements under 30 TAC §115.421(a)(9)(iii) due to either: 1) the lack of commercially-available compliant coatings which meet product and military specifications, and 2) the lack of a technically or economically viable alternative by re-engineering the processes or adding further control equipment. Therefore, the ESS supports Bell's request. A copy of the Provisions agreed by the company to ensure the enforceability of the ARACT is attached.

The commission has prepared a Takings Impact Assessment for this revision pursuant to Texas Government Code Annotated Section 2007.043. The following is a summary of that Assessment. The specific purpose of the revision is to allow Bell to use an ARACT in lieu of the control technology requirements specified in Chapter 115. The revision will substantially advance this

specific purpose by allowing Bell to use commercially available compliant coatings which meet the product and military specifications under the ARACT requirements which are more technically or economically viable than the requirements of Chapter 115. Promulgation and enforcement of this revision could affect private real property which is the subject of the rules. However, an exception to the application of Chapter 2007 of the Texas Government Code listed in Section 2007.003(b) applies to this revision. This action is reasonably taken to fulfill an obligation mandated by federal law [Section 2007.003(b)(4).] Therefore, this revision will not constitute a takings under Chapter 2007 of the Texas Government Code.

A public hearing was held in Austin on January 16, 1996, at the TNRCC Austin offices, pursuant to the requirements of the Texas Health and Safety Code Annotated, §382.017; Texas Government Code Annotated, Subchapter B, Chapter 2001; and Title 40 Code of Federal Regulations, concerning the State Implementation Plan, to receive testimony regarding Bell ARACT. Written comments were accepted through January 22, 1996.

No oral testimony was received at the hearing, and written testimony was received from one commenter, Bell, during the comment period. The Bell testimony requested a few changes in the proposed ARACT provisions.

The staff recommends that the commission adopt this ARACT request.

Attachment

Texas Natural Resource Conservation Commission
Chapter 330
Municipal Solid Waste
Rule Log No. 95150-330-WS/95151-330-WS

The Texas Natural Resource Conservation Commission (commission or TNRCC) adopts new §§330.970-330.976 and §§330.980-330.989, relating to Grants Pertaining to the Collection, Reuse, and Recycling of Used Oil and Waste Tire Recycling and Energy Recovery Grants, respectively. New §§330.973, 330.975, 330.976, and 330.983-330.989 are adopted with changes to the proposed text as published in the November 17, 1995, issue of the *Texas Register* (20 TexReg 9541). New §§330.970-330.972, 330.974 and 330.980-330.982 are adopted without changes and will not be republished.

The adopted rules, in two new subchapters, implement three types of grant programs directed by provisions in Senate Bill (SB)1683 and SB 776 enacted by the 74th Legislature, 1995. Subchapter U pertains to grants for the special collection and recycling of used motor oil. The grants are to be provided from the Used Oil Recycling Fund which is funded primarily by fees collected on the first sale of automotive oil. Subchapter V pertains to grants for entities which construct facilities for recycling scrap tires into useful products and for entities that retrofit existing energy recovery facilities to enable utilization of shredded tires or whole tires as fuel. The grants are to be provided from the Waste Tire Recycling Fund which is funded primarily by fees collected on the sale of new and good used tires.

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated Section 2007.043. The following is a summary of that Assessment. The specific purpose of the rule is to implement the provisions in SB 1683, 74th Legislature, which expanded the used oil recycling grants program, and to implement the provisions in SB 776, 74th Legislature, which established grant programs for construction of waste tire recycling facilities and retrofitting of waste tire energy recovery facilities. The rules will substantially advance this specific purpose by delineating eligible grant-supported activities, eligible applicants, the manner in which grant announcements will be made, and how grant recipients will be selected. In addition, the waste tire recycling grant rules cover additional grant-related requirements for construction of waste tire recycling facilities and for retrofitting of waste tire energy recovery facilities. Promulgation and enforcement of these rules will not adversely affect private real property and cannot result in a “taking” because the rules relate only to the processes for awarding grants for activities involving the recycling of used oil and waste tires, and for delineating eligible grant-supported activities, eligible applicants, and responsibilities of grant recipients.

The TNRCC received comments concerning the waste tire grant rules from the following: Aluminum Company of America; GreenMan Technologies, Inc.; Lone Star Chapter of the Sierra Club; North

Texas Cement Company; World Tire Recycling, Inc.; Downwinders At Risk (Midlothian, Texas); and Wimberley SAFE.

The definition of the used oil grant program advisory committee as proposed in §330.973 did not include a list of duties of the committee pursuant to Texas Health and Safety Code, §371.023(c). The commission believes that the definition should include the committee's statutory duties in the rule and has included such language.

APPENDIX E

Bill Number: TX74RSB 14
ENROLLED

Date: 5/30/95

1 AN ACT

2 relating to protecting private real property rights from certain
3 actions of this state or a political subdivision of this state.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Subtitle A, Title 10, Government Code, is
6 amended by adding Chapter 2007 to read as follows:

7 CHAPTER 2007. GOVERNMENTAL ACTION AFFECTING PRIVATE

8 PROPERTY RIGHTS

9 SUBCHAPTER A. GENERAL PROVISIONS

10 Sec. 2007.001. SHORT TITLE. This chapter may be cited as
11 the Private Real Property Rights Preservation Act.

12 Sec. 2007.002. DEFINITIONS. In this chapter:

13 (1) "Governmental entity" means:

14 (A) a board, commission, council, department,

15 or other agency in the executive branch of state government that

16 is created by constitution or statute, including an institution

17 of higher education as defined by Section 61.003, Education Code;

18 or

19 (B) a political subdivision of this state.

20 (2) "Owner" means a person with legal or equitable

1 title to affected private real property at the time a taking
2 occurs.

3 (3) "Market value" means the price a willing buyer
4 would pay a willing seller after considering all factors in the
5 marketplace that influence the price of private real property.

6 (4) "Private real property" means an interest in
7 real property recognized by common law, including a groundwater
8 or surface water right of any kind, that is not owned by the
9 federal government, this state, or a political subdivision of
10 this state.

11 (5) "Taking" means:

12 (A) a governmental action that affects
13 private real property, in whole or in part or temporarily or
14 permanently, in a manner that requires the governmental entity to
15 compensate the private real property owner as provided by the
16 Fifth and Fourteenth Amendments to the United States Constitution
17 or Section 17 or 19, Article I, Texas Constitution; or

18 (B) a governmental action that:

19 (i) affects an owner's private real
20 property that is the subject of the governmental action, in whole
21 or in part or temporarily or permanently, in a manner that
22 restricts or limits the owner's right to the property that would
23 otherwise exist in the absence of the governmental action; and

24 (ii) is the producing cause of a

1 reduction of at least 25 percent in the market value of the
2 affected private real property, determined by comparing the
3 market value of the property as if the governmental action is not
4 in effect and the market value of the property determined as if
5 the governmental action is in effect.

6 Sec. 2007.003. APPLICABILITY. (a) This chapter applies
7 only to the following governmental actions:

8 (1) the adoption or issuance of an ordinance, rule,
9 regulatory requirement, resolution, policy, guideline, or similar
10 measure;

11 (2) an action that imposes a physical invasion or
12 requires a dedication or exaction of private real property;

13 (3) an action by a municipality that has effect in
14 the extraterritorial jurisdiction of the municipality, excluding
15 annexation, and that enacts or enforces an ordinance, rule,
16 regulation, or plan that does not impose identical requirements
17 or restrictions in the entire extraterritorial jurisdiction of
18 the municipality; and

19 (4) enforcement of a governmental action listed in
20 Subdivisions (1) through (3), whether the enforcement of the
21 governmental action is accomplished through the use of
22 permitting, citations, orders, judicial or quasi-judicial
23 proceedings, or other similar means.

24 (b) This chapter does not apply to the following

1 governmental actions:

2 (1) an action by a municipality except as provided

3 by Subsection (a)(3);

4 (2) a lawful forfeiture or seizure of contraband as

5 defined by Article 59.01, Code of Criminal Procedure;

6 (3) a lawful seizure of property as evidence of a

7 crime or violation of law;

8 (4) an action, including an action of a political

9 subdivision, that is reasonably taken to fulfill an obligation

10 mandated by federal law or an action of a political subdivision

11 that is reasonably taken to fulfill an obligation mandated by

12 state law;

13 (5) the discontinuance or modification of a program

14 or regulation that provides a unilateral expectation that does

15 not rise to the level of a recognized interest in private real

16 property;

17 (6) an action taken to prohibit or restrict a

18 condition or use of private real property if the governmental

19 entity proves that the condition or use constitutes a public or

20 private nuisance as defined by background principles of nuisance

21 and property law of this state;

22 (7) an action taken out of a reasonable good faith

23 belief that the action is necessary to prevent a grave and

24 immediate threat to life or property;

1 (8) a formal exercise of the power of eminent
2 domain;
3 (9) an action taken under a state mandate to
4 prevent waste of oil and gas, protect correlative rights of
5 owners of interests in oil or gas, or prevent pollution related
6 to oil and gas activities;
7 (10) a rule or proclamation adopted for the purpose
8 of regulating water safety, hunting, fishing, or control of
9 nonindigenous or exotic aquatic resources;
10 (11) an action taken by a political subdivision:
11 (A) to regulate construction in an area
12 designated under law as a floodplain;
13 (B) to regulate on-site sewage facilities;
14 (C) under the political subdivisions's
15 statutory authority to prevent waste or protect rights of owners
16 of interest in groundwater; or
17 (D) to prevent subsidence;
18 (12) the appraisal of property for purposes of ad
19 valorem taxation;
20 (13) an action that:
21 (A) is taken in response to a real and
22 substantial threat to public health and safety;
23 (B) is designed to significantly advance the
24 health and safety purpose; and

1 (C) does not impose a greater burden than is
2 necessary to achieve the health and safety purpose; or
3 (14) an action or rulemaking undertaken by the
4 Public Utility Commission of Texas to order or require the
5 location or placement of telecommunications equipment owned by
6 another party on the premises of a certificated local exchange
7 company.

8 (c) Sections 2007.021 and 2007.022 do not apply to the
9 enforcement or implementation of a statute, ordinance, order,
10 rule, regulation, requirement, resolution, policy, guideline, or
11 similar measure that was in effect September 1, 1995, and that
12 prevents the pollution of a reservoir or an aquifer designated as
13 a sole source aquifer under the federal Safe Drinking Water Act
14 (42 U.S.C. Section 300h-3(e)).

15 (d) This chapter applies to a governmental action taken
16 by a county only if the action is taken on or after September 1,
17 1997.

18 (e) This chapter does not apply to the enforcement or
19 implementation of Subchapter B, Chapter 61, Natural Resources
20 Code, as it existed on September 1, 1995, or to the enforcement
21 or implementation of any rule or similar measure that was adopted
22 under that subchapter and was in existence on September 1, 1995.

23 Sec. 2007.004. WAIVER OF GOVERNMENTAL IMMUNITY;
24 PERMISSION TO SUE. (a) Sovereign immunity to suit and liability

1 is waived and abolished to the extent of liability created by
2 this chapter.

3 (b) This section does not authorize a person to execute a
4 judgment against property of the state or a governmental entity.

5 Sec. 2007.005. ALTERNATIVE DISPUTE RESOLUTION. Chapter
6 154, Civil Practice and Remedies Code, applies to a suit filed
7 under this chapter.

8 Sec. 2007.006. CUMULATIVE REMEDIES. (a) The provisions
9 of this chapter are not exclusive. The remedies provided by this
10 chapter are in addition to other procedures or remedies provided
11 by law.

12 (b) A person may not recover under this chapter and also
13 recover under another law or in an action at common law for the
14 same economic loss.

15 (Sections 2007.007 to 2007.020 reserved for expansion)

16 SUBCHAPTER B. ACTION TO DETERMINE TAKING

17 Sec. 2007.021. SUIT AGAINST POLITICAL SUBDIVISION.

18 (a) A private real property owner may bring suit under this
19 subchapter to determine whether the governmental action of a
20 political subdivision results in a taking under this chapter. A
21 suit under this subchapter must be filed in a district court in
22 the county in which the private real property owner's affected
23 property is located. If the affected private real property is
24 located in more than one county, the private real property owner

1 may file suit in any county in which the affected property is
2 located.

3 (b) A suit under this subchapter must be filed not later
4 than the 180th day after the date the private real property owner
5 knew or should have known that the governmental action restricted
6 or limited the owner's right in the private real property.

7 Sec. 2007.022. ADMINISTRATIVE PROCEEDING AGAINST STATE
8 AGENCY. (a) A private real property owner may file a contested
9 case with a state agency to determine whether a governmental
10 action of the state agency results in a taking under this
11 chapter.

12 (b) A contested case must be filed with the agency not
13 later than the 180th day after the date the private real property
14 owner knew or should have known that the governmental action
15 restricted or limited the owner's right in the private real
16 property.

17 (c) A contested case filed under this section is subject
18 to Chapter 2001 except to the extent of a conflict with this
19 subchapter.

20 Sec. 2007.023. ENTITLEMENT TO INVALIDATION OF
21 GOVERNMENTAL ACTION. (a) Whether a governmental action results
22 in a taking is a question of fact.

23 (b) If the trier of fact in a suit or contested case
24 filed under this subchapter finds that the governmental action is

1 a taking under this chapter, the private real property owner is
2 only entitled to, and the governmental entity is only liable for,
3 invalidation of the governmental action or the part of the
4 governmental action resulting in the taking.

5 Sec. 2007.024. JUDGMENT OR FINAL DECISION OR ORDER.

6 (a) The court's judgment in favor of a private real property
7 owner under Section 2007.021 or a final decision or order issued
8 under Section 2007.022 that determines that a taking has occurred
9 shall order the governmental entity to rescind the governmental
10 action, or the part of the governmental action resulting in the
11 taking, as applied to the private real property owner not later
12 than the 30th day after the date the judgment is rendered or the
13 decision or order is issued.

14 (b) The judgment or final decision or order shall include
15 a fact finding that determines the monetary damages suffered by
16 the private real property owner as a result of the taking. The
17 amount of damages is determined from the date of the taking.

18 (c) A governmental entity may elect to pay the damages as
19 compensation to the private real property owner who prevails in a
20 suit or contested case filed under this subchapter. Sovereign
21 immunity to liability is waived to the extent the governmental
22 entity elects to pay compensation under this subsection.

23 (d) If a governmental entity elects to pay compensation
24 to the private real property owner:

1 (1) the court that rendered the judgment in the
2 suit or the state agency that issued the final order or decision
3 in the case shall withdraw the part of the judgment or final
4 decision or order rescinding the governmental action; and

5 (2) the governmental entity shall pay to the owner
6 the damages as determined in the judgment or final order not
7 later than the 30th day after the date the judgment is rendered
8 or the final decision or order is issued.

9 (e) If the governmental entity does not pay compensation
10 to the private real property owner as provided by Subsection (d),
11 the court or the state agency shall reinstate the part of the
12 judgment or final decision or order previously withdrawn.

13 (f) A state agency that elects to pay compensation to the
14 private real property owner shall pay the compensation from funds
15 appropriated to the agency.

16 Sec. 2007.025. APPEAL. (a) A person aggrieved by a
17 judgment rendered in a suit filed under Section 2007.021 may
18 appeal as provided by law.

19 (b) A person who has exhausted all administrative
20 remedies available within the state agency and is aggrieved by a
21 final decision or order in a contested case filed under Section
22 2007.022 is entitled to judicial review under Chapter 2001.
23 Review by a court under this subsection is by trial de novo.

24 (c) If a private real property owner prevails in a suit

1 or contested case filed under this subchapter and the
2 governmental entity appeals, the court or the state agency shall
3 enjoin the governmental entity from invoking the governmental
4 action or the part of the governmental action resulting in the
5 taking, pending the appeal of the suit or contested case.

6 Sec. 2007.026. FEES AND COSTS. (a) The court or the
7 state agency shall award a private real property owner who
8 prevails in a suit or contested case filed under this subchapter
9 reasonable and necessary attorney's fees and court costs.

10 (b) The court or the state agency shall award a
11 governmental entity that prevails in a suit or contested case
12 filed under this subchapter reasonable and necessary attorney's
13 fees and court costs.

14 (Sections 2007.027 to 2007.040 reserved for expansion)

15 SUBCHAPTER C. REQUIREMENTS FOR PROPOSED GOVERNMENTAL ACTION

16 Sec. 2007.041. GUIDELINES. (a) The attorney general
17 shall prepare guidelines to assist governmental entities in
18 identifying and evaluating those governmental actions described
19 in Section 2007.003(a)(1) through (3) that may result in a
20 taking.

21 (b) The attorney general shall file the guidelines with
22 the secretary of state for publication in the Texas Register in
23 the manner prescribed by Chapter 2002.

24 (c) The attorney general shall review the guidelines at

1 least annually and revise the guidelines as necessary to ensure
2 consistency with the actions of the legislature and the decisions
3 of the United States Supreme Court and the supreme court of this
4 state.

5 (d) A person may make comments or suggestions or provide
6 information to the attorney general concerning the guidelines.
7 The attorney general shall consider the comments, suggestions,
8 and information in the annual review process required by
9 this section.

10 (e) Material provided to the attorney general under
11 Subsection (d) is public information.

12 Sec. 2007.042. PUBLIC NOTICE. (a) A political
13 subdivision that proposes to engage in a governmental action
14 described in Section 2007.003(a)(1) through (3) that may result
15 in a taking shall provide at least 30 days' notice of its intent
16 to engage in the proposed action by providing a reasonably
17 specific description of the proposed action in a notice published
18 in a newspaper of general circulation published in the county in
19 which affected private real property is located. If a newspaper
20 of general circulation is not published in that county, the
21 political subdivision shall publish a notice in a newspaper of
22 general circulation located in a county adjacent to the county in
23 which affected private real property is located. The political
24 subdivision shall, at a minimum, include in the notice a

1 reasonably specific summary of the takings impact assessment that
2 was prepared as required by this subchapter and the name of the
3 official of the political subdivision from whom a copy of the
4 full assessment may be obtained.

5 (b) A state agency that proposes to engage in a
6 governmental action described in Section 2007.003(a)(1) or (2)
7 that may result in a taking shall:

8 (1) provide notice in the manner prescribed by
9 Section 2001.023; and

10 (2) file with the secretary of state for
11 publication in the Texas Register in the manner prescribed by
12 Chapter 2002 a reasonably specific summary of the takings impact
13 assessment that was prepared by the agency as required by this
14 subchapter.

15 Sec. 2007.043. TAKINGS IMPACT ASSESSMENT. (a) A
16 governmental entity shall prepare a written takings impact
17 assessment of a proposed governmental action described in Section
18 2007.003(a)(1) through (3) that complies with the evaluation
19 guidelines developed by the attorney general under Section
20 2007.041 before the governmental entity provides the public
21 notice required under Section 2007.042.

22 (b) The takings impact assessment must:

23 (1) describe the specific purpose of the proposed
24 action and identify:

1 (A) whether and how the proposed action
2 substantially advances its stated purpose; and
3 (B) the burdens imposed on private real
4 property and the benefits to society resulting from the proposed
5 use of private real property;
6 (2) determine whether engaging in the proposed
7 governmental action will constitute a taking; and
8 (3) describe reasonable alternative actions that
9 could accomplish the specified purpose and compare, evaluate, and
10 explain:
11 (A) how an alternative action would further
12 the specified purpose; and
13 (B) whether an alternative action would
14 constitute a taking.
15 (c) A takings impact assessment prepared under this
16 section is public information.
17 Sec. 2007.044. SUIT TO INVALIDATE GOVERNMENTAL ACTION.
18 (a) A governmental action requiring a takings impact assessment
19 is void if an assessment is not prepared. A private real
20 property owner affected by a governmental action taken without
21 the preparation of a takings impact assessment as required by
22 this subchapter may bring suit for a declaration of the
23 invalidity of the governmental action.
24 (b) A suit under this section must be filed in a district

1 court in the county in which the private real property owner's
2 affected property is located. If the affected property is
3 located in more than one county, the private real property owner
4 may file suit in any county in which the affected property is
5 located.

6 (c) The court shall award a private real property owner
7 who prevails in a suit under this section reasonable and
8 necessary attorney's fees and court costs.

9 Sec. 2007.045. UPDATING OF CERTAIN ASSESSMENTS REQUIRED.

10 A state agency that proposes to adopt a governmental action
11 described in Section 2007.003(a)(1) or (2) that may result in a
12 taking as indicated by the takings impact assessment shall update
13 the assessment if the action is not adopted before the 180th day
14 after the date the notice is given as required by Section
15 2001.023.

16 SECTION 2. Section 2002.011, Government Code, is amended
17 to read as follows:

18 Sec. 2002.011. TEXAS REGISTER. The secretary of state
19 shall compile, index, cross-index to statute, and publish a
20 publication to be known as the Texas Register. The register
21 shall contain:

22 (1) notices of proposed rules issued and filed in
23 the office of the secretary of state as provided by Subchapter B
24 of Chapter 2001;

- 1 (2) the text of rules adopted and filed in the
2 office of the secretary of state;
- 3 (3) notices of open meetings issued and filed in the
4 office of the secretary of state as provided by law;
- 5 (4) executive orders issued by the governor;
- 6 (5) summaries of requests for opinions of the
7 attorney general and of the State Ethics Advisory Commission;
- 8 (6) summaries of opinions of the attorney general
9 and of the State Ethics Advisory Commission; [~~and~~]
- 10 (7) guidelines prepared by the attorney general
11 under Section 2007.041;
- 12 (8) notices relating to the preparation of takings
13 impact assessments as provided by Section 2007.043; and
- 14 (9) other information of general interest to the
15 public of this state, including:
- 16 (A) federal legislation or regulations
17 affecting the state or a state agency; and
- 18 (B) state agency organizational and personnel
19 changes.

20 SECTION 3. Subchapter B, Chapter 23, Tax Code, is amended
21 by adding Section 23.11 to read as follows:

22 Sec. 23.11. GOVERNMENTAL ACTION THAT CONSTITUTES TAKING.
23 In appraising private real property, the effect of a governmental
24 action on the market value of private real property as determined

1 in a suit or contested case filed under Chapter 2007, Government
2 Code, shall be taken into consideration by the chief appraiser in
3 determining the market value of the property.

4 SECTION 4. The attorney general shall file the guidelines
5 for publication as required by Section 2007.041, Government Code,
6 as added by this Act, not later than January 1, 1996.

7 SECTION 5. Before the 75th Legislature convenes, the
8 comptroller of public accounts shall:

9 (1) report to the governor, lieutenant governor,
10 speaker of the house of representatives, and attorney general
11 regarding state agency compliance with the takings impact
12 assessment procedures prescribed by Section 2007.043, Government
13 Code, as added by this Act, and the costs to governmental
14 entities associated with implementation of this Act; and

15 (2) make recommendations for improving the takings
16 impact assessment process.

17 SECTION 6. (a) Except as provided by Subsections (b) and
18 (c) of this section, this Act takes effect September 1, 1995.

19 (b) Sections 2007.042 and 2007.043, Government Code, as
20 added by this Act, take effect January 1, 1996, and apply only to
21 a governmental action described in Subdivisions (1) through (3),
22 Subsection (a), Section 2007.003, Government Code, as added by
23 this Act, that is first proposed to be taken on or after that
24 date.

1 (c) Sections 2007.021 and 2007.022, Government Code, as
2 added by this Act, apply to:

3 (1) a governmental action described in Subdivisions
4 (1) through (3), Subsection (a), Section 2007.003, Government
5 Code, as added by this Act, that is first proposed on or after
6 September 1, 1995; and

7 (2) a governmental action described in Subdivision
8 (4), Subsection (a), Section 2007.003, Government Code, as added
9 by this Act, if the action is initiated after September 1, 1995.

10 SECTION 7. The importance of this legislation and the
11 crowded condition of the calendars in both houses create an
12 emergency and an imperative public necessity that the
13 constitutional rule requiring bills to be read on three several
14 days in each house be suspended, and this rule is hereby
15 suspended.

16 _____
17 President of the Senate Speaker of the House

18 I hereby certify that S.B. No. 14 passed the Senate on
19 April 12, 1995, by the following vote: Yeas 26, Nays 5;
20 May 19, 1995, Senate refused to concur in House amendments and
21 requested appointment of Conference Committee; May 23, 1995,
22 House granted request of the Senate; May 29, 1995, Senate adopted
23 Conference Committee Report by a viva-voce vote.

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Secretary of the Senate

I hereby certify that S.B. No. 14 passed the House, with
amendments, on May 18, 1995, by a non-record vote; May 23, 1995,
House granted request of the Senate for appointment of Conference
Committee; May 27, 1995, House adopted Conference Committee
Report by a non-record vote.

Chief Clerk of the House

Approved:

Date

Governor